COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 17-130 01 through 04

COMMONWEALTH)
)
v.)
)
MICHAEL BRYANT)

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

Now comes the Commonwealth, by and through its Attorney, Michael D. O'Keefe and offers to this Honorable Court this after-hearing Memorandum in response to Defendant's Motion to Suppress.

ARGUMENT 1

The officers had probable cause to stop the Range Rover and arrest and search defendant Bryant for narcotics distribution based on the extensive narcotics investigation by Barnstable Police.

A warrantless arrest based on information supplied by an informant must satisfy the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964); and *Spinelli v. United States*, 393 U.S. 410 (1969) *See Commonwealth v. Upton (III)*, 394 Mass. 363 (1985). An officer must demonstrate that the informant was credible or that his information was reliable as well as the basis of the informant's knowledge. A deficiency in either or both prongs of the test can be remedied by independent police corroboration. *Upton (II) Supra, at* 375-376. *See Commonwealth v.* Bottari, 395 Mass. 777, 783-784(1985).

The testimony of three Barnstable officers over three days on defendant's motion to suppress provided an overwhelming amount of probable cause to stop and arrest defendant Bryant for distribution of cocaine and oxycodone. The testimony of the police officers revealed that two Confidential Informants, over the period of five to six months, gave Barnstable police information about defendant Bryant's narcotics distribution on Cape Cod.

The two-pronged test outlined in *Upton* has a Veracity Prong and a Basis of Knowledge Prong. The Veracity Prong of the *Aguilar* test is satisfied either by demonstrating that the informant is a credible person or by showing that his information is reliable. *Commonwealth v. Parapar*, 404 Mass. 319, 322 (1989).

Veracity Prong

Examples of credibility and that the Informants' information is reliable *(Commonwealth v. Parapar, Supra)* in the instant case include:

1) CS1's past instances resulting in arrests and criminal indictments on five prior narcotics investigations 1-17,18.
2) Police knew Informants' identities and that carries a strong indicia of reliability. *Commonwealth v. Bakolan*, 412 Mass. 295, 301 (1992)
3) Declarations against Penal Interest in that CS1 and CS2 admitted to Barnstable Police that they buy narcotics from defendant Bryant and CS2 *sells* oxycodone for defendant Bryant); *Commonwealth v. Alvarez*, 422 Mass. 198, 204,205 (1996); *Commonwealth v. Simpson*, 442 Mass. 1009 (2004);
4) The precision and detail of CS1's and CS2's tips may buttress the reliability of the informants' information. *Commonwealth v. Aarhus*, 387 Mass. 735, 744 (1982); *Commonwealth v. Alfonso A.*, 438 Mass. 372 (2003) (for an informant's tip to be considered reliable, despite failing to satisfy the requirements of the veracity prong, it must contain a high degree of specificity) *Commonwealth v. Oliveira*, 35 Mass.App.Ct. 645(1983) (the incredible detail given by both CS1 and CS2 concerning Bryant's relationships with large-scale customers such as Chapman and Lindholm, and the names/addresses of small scale cocaine and oxycodone customers, as well as detailed information about Bryant's ties to Brooklyn and travels to and from NY

Basis of Knowledge Prong

5) *The 2nd prong of the* Aguilar test requires a demonstration of the basis of the informant's knowledge. Most often the informant claims to have seen or overheard what he reports. If so, his observations and opportunity to observe satisfy the basis of knowledge test. *Commonwealth v. Pellier*, 362 Mass. 621, 625(1972).). There are cases where the informant(s) describe the characteristics of the targeted person or the person's activities in such detail that a court may infer that the informant had direct contact with the person, thus establishing basis of knowledge. *Commonwealth v. Oliviera, Supra.* CS1 and CS2 both indicated to police that they purchased either cocaine or oxycodone on a regular basis from defendant Bryant. Detective Butler testified that CS2 told police that in late February, 2017, she picked defendant Bryant up at the Bourne bus station when he arrived back from a trip to New York. They went back to the Grant Street stash house and CS2 personally observed defendant Bryant with a kilo of cocaine attached to his body with Saran Wrap. 2-166.

Corroboration of Informant's Tips

6) It is possible to satisfy the *Aguilar-Spinelli* test when neither prong has been met, if the details of the tip are corroborated by independent police observation. *Commonwealth v. Ramos*, 31 Mass.App.Ct. 963, 964 (1992). In this case, Barnstable Police corroborated so many facts first told to them by both CS1 and CS2. Commonwealth *v. Bakolian, supra at 302.* (Police confirmed every detail of what they were told about the suspect's background, and through surveillance, each of the informant's predictions as to his method of operation) In addition, successful corroboration does not require verification of every detail of an informant's information. "If it can be shown that part of the information provided by an informer is correct, this gives credibility to the remainder of the information. This is closely analogous to the theory that an informer may be considered reliable if information provided in the past had proved to be correct. *See Commonwealth v. Harding*, 27 Mass.App.Ct. 430, 436 (1989); *Commonwealth v.* Blake, 23 MassApCt. 456, 460 n.5(1987), where police verified at least some details of informant's information. Corroboration of innocent facts may be sufficient to establish the reliability of a tip. *Commonwealth v.* Duran, 363 Mass. 229, 233 (1973) *See Commonwealth v.* Wallace, 22 Mass.App.Ct. 247, 250 (1986) (despite being unemployed, suspected drug trafficker lived lavishly).

Corroboration may consist of the observation of suspicious patterns of behavior. (emphasis added). Commonwealth v. Peguero, 26 Mass.App.Ct. 912-914)(1988)(officers documented a high incidence of "come and go" traffic at an alleged drug distribution site, including visits by a number of known drug dealers); *Commonwealth v.* Valdez 402 Mass. 65, 71 &n.4(1988); *Commonwealth v. Cacicio, 31 Mass.App.Ct. 943, 945(1991)*(numerous short duration visits).

Police corroboration in our case includes:

a) CS1 knew Chapman owed Bryant money from drug debt and Bryant took his home and Range Rover to cover debt. This was corroborated by Town Hall records;

b) Defendant travelling to and from Brooklyn New York once per week to re-supply and then going to Grant Rd. stash house to store and cut/package the drugs. Travel and time spent at Grant Rd. corroborated by GPS surveillance;

c) For periods of time and that the duration of defendant Bryant's stays in New York were getting shorter because he was having relationship troubles with his significant other and so did not want to stay in New York

as he did previously. Barnstable Police corroborated that the duration of visits by Bryant in New York became shorter and shorter;

d) Barnstable police physical surveillance and GPS surveillance. Barnstable Police recognized *a pattern* of defendant Bryant driving from Grant Rd. stash house to numerous customers' residences identified by CS1 and CS2, for quick stops between 5 and 10 minutes, and then on to the next stop. 1-57, 58. These observations were consistent with information received by CS1 and CS2 that defendant Bryant regularly delivered drugs to his customers.

e) Det. Bryant testified that during the investigation of Bryant, there was no indication that defendant was employed. Defendant owned a home and a vehicle and yet he did not go to work, lending more corroboration to both informants' information that defendant made his money as a narcotics dealer. 2-163

f) See *many other examples from Barnstable Police testimony cited below from the motion hearing transcript.*

7) Mutually Corroborative tips by CS1 and CS2 in that they gave very similar information regarding defendant Bryant's narcotics' enterprise. (*see many examples below in the facts section)*. Mutually consistent, detailed tips from unproven information may be cross-corroborating. We recognize that unnamed informant's detailed statements corroborating each other in significant, detailed respects, particularly as to criminal conduct or as to the admission of serious wrongdoing by a person, could alone support a finding of probable cause by establishing the veracity of the informants. *Commonwealth v. Nowells*, 390 Mass. 621, 627 (1983), C*ommonwealth v. Barbosa*, 463 Mass. 116, 134 (2012) (same); (mutually corroborative known informants, independent police verification) *Commonwealth v. Parapar*, 404 Mass. 319, 323 (1989);

8) Corroboration may also consist of a confirmatory act. *Commonwealth v. Desper*, 419 Mass. 163, 168-170(1994)(controlled purchase of narcotics). In the instant case, BOTH confidential sources were willing to make controlled buys for Barnstable Police. There were a total of six (6) transactions between CS1 and CS2 in which they were involved in either the traditional "controlled buys" or transactions which involved CS2 being fronted drugs by Bryant and then returning days later to pay Bryant the proceeds of the sale of those fronted drugs. (Dates for CS1: March 21 and May 22; dates for CS2: March 23, March 27, March 31) The defendant argues that because CS2 was not searched that the controlled buys should not be considered as evidence supporting the veracity of the informants. This Court must keep in mind that there were two (2) controlled buys made by CS1 and those buys do not appear to be in dispute by defendant

Bryant, and that only the controlled buys involving CS2 are in dispute. With respect to the search of CS2, Detective Butler and Detective Ginnetty testified that, in fact, CS2, who was a female, was searched, but that her search was not as extensive as would be the case with a male informant.

According to Detective Butler's testimony at 2-11:
We do search everybody prior to a controlled purchase
This particular controlled buy
I recall going thru pockets of a light fleece jacket of CS2. Searched her vehicle and searched her purse.
Remembers wearing a light jacket
Recalled a lot from last Wednesday about what happened during course of investigation.
I've spent all weekend trying to recall the events. That's included (sic) talking to other officers who were present during buys about the way they happened. 2-12

And Detective Butler's testimony at 2-153, 154:
"Do you have a memory of searching CS2 during the controlled buys?
Yes I do.
On which date?
On all dates: the 23rd and 27th and then again on the 31st
After I left here, I confirmed with some of the other detectives who recalled specifically searching CS2. And I recall searching pockets of CS2, searching the purse on one occasion, while Det. Ginnetty on one occasion, searched her and I searched the car
Traditionally, when we met with CS2, her vehicle was searched her purse and her pockets. 2-154
At one point, she had a cast on her arm and I recall saying we can't search that, so that helped jog my memory since last Wednesday.

According to Detective Ginnetty's testimony at 3-26, on March 23, Detective Ginnetty arrived back at 122 Cedar ST (from Cedarville) and CS2 met Butler and Ginnetty at a prearranged location. Butler searched inside CS2's vehicle. Ginnetty had a conversation with CS2 and searched into her pockets. She had a jacket on and she kind of opened up her jacket and I searched pants pockets, jacket pockets. Just a quick little search of her. Didn't go up and down her body, arms legs 3-30.
She was very cooperative and didn't have any signs, [like she was]holding any drugs on us.

The Defendant cites *Desper* in arguing that there was insufficient evidence of "controlled buys" in this case in that the CS2 controlled buys met neither the legal

standard for controlled buys nor the Barnstable Police Department Policy regarding controlled buys and informants. The Commonwealth disagrees. The ruling in *Desper* does not require this Court to set aside the CS2 controlled buys (or the fronted drug transactions) in its Veracity determination of CS2. Instead, this Court should consider the controlled buys as additional evidence of the veracity of CS2. *Desper* does not stand for the proposition that if an informant is NOT searched, than that "controlled buy" should not be evidence supporting an informant's veracity. In *Desper*, there was only one (1) informant and there were only (2) controlled buys. At issue was whether the two "controlled buys" from the defendants could compensate for the affidavit's ***deficient*** (emphasis added) showing on the point of the informant's veracity. In that case, the affiant twice watched the informant enter the building and leave a short time later with a substance that tested positive for cocaine.

The Court noted that the principal difficulty with the "controlled buy" was that the affiant did not state that the informant was searched for drugs before entering the building. The result was **"a buy that relies on the veracity of an informant whose veracity has not otherwise been proven"**. (Emphasis added)The Court ***emphasized*** that the affidavit in *Desper* was not a model of its kind. When a police officer relies on a "controlled buy" to compensate for otherwise deficient information furnished by a confidential informant, the steps customary in a controlled buy should be taken. Id. at 170. Nonetheless, the Court in *Desper* held that the probable cause requirements were met in that case, noting that "an informant who undertakes to purchase narcotics under the supervision of a police officer must realize that he may be searched before he enters a suspect's premises. An informant would be unlikely to risk the consequences, including possible arrest, entailed by arriving at a prearranged meeting with a police officer with narcotics on his person." *Id. at 170. The Desper* Court held: "...we think the magistrate who authorized the warrant could reasonably conclude that this supervised purchase of narcotics was sufficient to establish the reliability of the informant, thus satisfying the standards of *Commonwealth v. Upton" Id. at 170.*

FACTS BASED ON SUPPRESSION HEARING EVIDENCE:

Pertinent Testimony on the Issue of Veracity, Basis of Knowledge and Corroboration:

There were two confidential sources of information: CS1 and CS2. Police started receiving information from CS1 in February of 2017 and in early March from CS2. With respect to CS1, police knew both CI's names, addresses, contact information. The police met with both CS1 and CS2 and knew their names, where they lived and how to contact them. 1-19. According to CS1, he had known Michael Bryant for over a dozen years 1-14 and knew that Bryant had dual residency in that he was from Brooklyn NY

but mostly lived on Cape Cod. 1-15. Bryant was living at 122 Cedar Street and traveled to NY approximately once per week for the purpose of picking up cocaine and transporting it back to Cape Cod for redistribution. CS1 had knowledge as to the criminal record of Bryant and believed Bryant had extensive criminal history in New York State. The police corroborated the information that Bryant had a criminal record in NY. CS1 had specific knowledge that Bryant was going to NY to pick up large amounts of cocaine and transporting it to Cape Cod 1-15. Once back on Cape Cod, Bryant used 24 Grant Rd in West Yarmouth as a stash house to store and repackage half-kilo to kilo amounts of cocaine into smaller amounts, for resale. Police determined the Grant Rd. address to be that of Peter Lindholm. 1-16.

CS1 identified specific people Bryant was supplying, such as the owner or resident at 24 Grant Rd, Peter Lindholm. CS1 believed Chapman was a customer of Bryant's and purchased smaller amounts of cocaine. CS1 informed police that Chapman was a longtime associate of Bryant and that Chapman owed Bryant several thousand dollars for past cocaine debts and arrangements were made to turn over Chapman's house to Bryant in exchange for some of the debt, and that a Range Rover previously owned by Chapman would also be transferred to pay Bryant for past cocaine debt. 1-17. Police corroborated that in fact 122 Cedar St was in both Bryant's and Chapman's names. CS1 also identified Gunnar Cahoon, with an address of 5 Rosetta St., West Yarmouth, which police corroborated, and Lindholm as drug customers of Bryant 1-18. Det. Butler testified that Barnstable had used CS1 as a source previously and that CS1 gave information used successfully in approximately 5 narcotics investigations, complete with arrests and indictments. 1-19.

With respect to CS2, she provided the same information as CS1, (mutually corroborating evidence per *Nowells, Supra.)* and then gave more specific information about Bryant's **oxycodone distribution methods**.1-19. CS2 told police that Bryant was from Brooklyn, that he traveled to Brooklyn once a week for the sole purpose of picking up cocaine and oxycodone and traveled back to Cape Cod with both products. Bryant had several customers on Cape Cod who also distributed cocaine and oxycodone for Bryant too. Throughout the investigation, CS2 was able to provide numerous names and address of oxycodone customers of Bryant and significantly, police were able to corroborate a very large number of these customers through electronic, physical and video surveillance.

CS2 gave police specific information as to amounts of cocaine and oxycodone Bryant would obtain in New York. CS2 said Bryant would resupply with hundreds and hundreds of pills and approximately half-kilo to a kilo of cocaine. 1-20 CS2 admitted to

police that she purchased oxycodone from Bryant on many occasions over the past 5 or 6 months and had obtained Oxycodone from Bryant in amounts of 30 to 50 pills. 1-21. CS2 was aware that Bryant would take his own vehicles to and from NY, or occasionally a rental vehicle or a bus. CS2 was aware that on a couple of occasions, Bryant came back to the Cape with narcotics on his person when he arrived (see further down in Commonwealth's memorandum for specifics involving Saran Wrap). CS2 was familiar with Lindholm and Cahoon and was aware that 24 Grant Rd. and 5 Rosetta were two addresses where CS2 knew Bryant traveled on regular basis to deliver cocaine. 1-22. She also knew 24 Grant Rd. to be a storage location and had actually been to Grant Rd. before. CS2 had also accompanied Bryant to Rosetta where CS2 observed Bryant and Cahoon meet on several occasions. CS2 gave police the name of Jamie who lived at 116 Oak St in Harwich and that Bryant was supplying amounts to Jamie of ounce quantities of cocaine. Police corroborated information CS2 gives them about numerous Oxycodone customers of Bryant. For instance, police corroborate CS2's information regarding Patricia Shay as an oxy customer. On April 6, Bryant drives to 59 North Main St S. Yarmouth and police observe behavior consistent with a drug transaction in that Bryant stays for 5-10 min. and leaves. This occurs on numerous occasions at this address over the entire investigation. The police corroborate that the vehicle in driveway is registered to Patricia Shay. CS2 had informed police that Shay was an oxycodone customer of Bryant's.

Collective Knowledge Doctrine

In making a probable cause determination, courts are often guided by the collective knowledge doctrine or "fellow-officer" rule where police are engaged in a collaborative effort, the individual knowledge of each officer involved may be "pooled" in evaluation the existence of probable cause. *Commonwealth v. Gullick*, 386 Mass. 278, 283 (1982); The doctrine applies to "horizontal" as well as "vertical" relationships. In a vertical relationship, an officer with knowledge of facts amounting to reasonable suspicion or probable cause directs another officer to make a stop or an arrest. In a horizontal relationship, two or more officers acting jointly have individual pieces of information that when assessed as a collective whole amount to the requisite level of cause. *United States v. Hensley*, 469 U.S. 221, 232 (1985)(police acted reasonably in relying on a flyer issued by officers in a neighboring suburb in stopping a defendant described as wanted for a violent felony.). In a horizontal application of the doctrine, the focus is on the aggregate knowledge possessed by all of the officers involved in the investigation. *United States v. Fiasconaro*, 315 F.3d 28,36 (1st Cir. 2002).

Massachusetts cases apply the collective knowledge doctrine in both the vertical and horizontal contexts, usually without drawing a formal distinction between the two. *See Commonwealth v. Carrington*, 20 Mass.AppCt. 525, 529 n.4 (1985) (knowledge of

the victim's statement given to a Boston officer prior to the defendant's apprehension imputed to an officer directed to make an arrest in Newton) (officers investigating an accident had sufficient information between them to arrest the defendant for drunk driving); *Commonwealth v. Rivet*, 30 Mass.App.Ct. 973, 975 (1991). Because of the extensive investigation of defendant Bryant involving numerous officers over six months, it is important for the Court to apply the collective knowledge doctrine in determining probable cause in this case.

Additional Probable Cause for Warrantless Arrest

Defendant Bryant's failure to stop for the police, who were clearly following him, may properly be viewed as another piece of evidence adding to the already mountainous probable cause the police had that defendant had just returned from resupply narcotics in New York and thus having in his possession a large quantity of illegal narcotics. *Commonwealth v. Va Meng Joe*, 425 Mass. 99 (1997)("since there is no doubt that the initial stop was justified, events subsequent to the lawful stop, coupled with the factors that supplied the police officers with ample reasonable suspicion to make the investigatory stop, provided the police officers with probable cause to arrest and search the defendant) 2 LaFave, Search and Seizure Section 3.6€, at 324 (3d ed. 1996) ("if there already exists a significant degree of suspicion concerning a particular person, the flight of that individual upon the approach of the police may be taken into account and may well elevate the pre-existing suspicion up to the requisite Fourth Amendment level of probable cause") *See also Commonwealth v. Ortiz*, 376 Mass. 349, 354 n.3 (1978).

ARGUMENT 2

Detective Mark Butler had Probable Cause for the warrantless search the Range Rover based on the extensive narcotics investigation by Barnstable Police in which the Range Rover was used by Bryant for drug distribution on a nearly daily basis.

There must be reasonable cause to believe that the place to be searched is connected to the underlying criminal activity and is thus a likely repository of evidence. *Commonwealth v. Tapia*, 463 Mass. 721, 726 (2012). During various stages of the investigation, Barnstable Police learned that Bryant was traveling to and from New York by car in order to resupply with cocaine and oxycodone. Initially, the vehicle Bryant used was a rental Toyota Forerunner, but soon after Bryant was regularly driving his own Range Rover. Police had probable cause to install a GPS tracking device on Bryant's vehicles based on his drug delivery activities. Barnstable obtained a GPS Warrant first for Bryant's rented 2017 Toyota Forerunner (on March 29, 2014) then Bryant's 2009 Range Rover (on April 4, 19, May 4, May 23) *see Exhibits 1-5.*

According to Detective Butler, the first GPS warrant (on the Forerunner) was obtained based on a combination of CS1 and CS2 intelligence and surveillance which corroborated their intelligence with Bryant's rental car (Forerunner) travelling to addresses of drug customers provided by both confidential sources. 1-36. GPS surveillance on that very first warrant revealed what police already knew from CS1 and CS2, and their own police surveillance: a pattern of Bryant traveling in his vehicle from his residence on Cedar Street to the stash house on Grant Rd., then minutes later traveling from Grant Rd. to numerous addresses throughout the area that were known, through information provided by CS1 and CS2, to be residences of Bryant's drug clients. In addition, many customers and/or residences were already known to Barnstable Police as housing those associated with illegal narcotics, based on prior narcotics' investigations. For example, Det. Butler testified that on April 6, Bryant was observed with Marco Silva who was known to police through prior drug investigations and "cases" involving cocaine and oxycodone 3-38.

On March 31, 2017, CS2 tells police that the Toyota Forerunner rental was returned and Bryant acquired the Range Rover for his own use. 1-43. CS2 further tells police that Bryant would be using the Range Rover and traveling to and from New York to Cape Cod to resupply with cocaine and oxycodone. 1-44. Barnstable police corroborated CS2's information by physical surveillance of Bryant at Hertz Car Rental returning the Toyota Forerunner and picking up the Range Rover at a collision shop. 1-45. On April 4, police further observed Bryant in his Range Rover traveling to Grant Rd. stash house. Minutes later a female shows up and parks, walks around to the side residence (which is entrance Bryant uses to access his area of the house). Three minutes later, the female returns to her car and leaves the area. 1-47.

Detective Butler and Detective Ginnetty testified to both physical and GPS surveillance of Bryant in his Range Rover on April 5, 2017 1-50 and 3-33. The GPS warrant for the Range Rover had been renewed. 1-50. Surveillance revealed that Bryant drove his Range Rover to the Grant Rd. stash house. He stayed for several minutes, then departed for Dana's Path in West Yarmouth. Bryant then traveled in his Range Rover to 59 North Main St. Yarmouth (residence of customer Patricia Shay, an oxycodone customer) 3-33), then proceeded to Mars Lane in Yarmouth (an address well known from prior narcotics investigations 3-33). The resident there came out and got into Bryant's Range Rover briefly and then returned to the residence. From the Mars Lane residence, Bryant drove back to the stash house, left and went back out in his Range Rover, making short stops at various locations. 1-52. According to CS2, these locations to which Bryant traveled were residences of Bryant's drug customers and that

Bryant was delivering the drugs to them. Detective Butler testified that this pattern of conduct was consistent with drug transactions. 1-51

The Court heard similar testimony from all three police witnesses: Det. Butler, Det. Ginnetty and Sgt. Chevalier, concerning police surveillance of Bryant in his Range Rover making rounds consistent with drug distribution on April 6, 2017, April 10, 2017, April 12, April 13 and during the two weeks between April 19 and May 4, 2017. Det. Butler indicated that this pattern of conduct was significant to police because it was exactly what CS1 and CS2 told them prior to police having any GPS or conducting surveillance. 1-57. Bryant would travel in his car, specifically go to Grant Rd. where he kept all his drugs, then would make his deliveries. This happened a lot of mornings throughout the week. Throughout the next two months, police learned through surveillance that Bryant would travel particularly from Grant Rd to Rosetta, North Main St. Mars Lane and six or seven other addresses on a regular basis. "We saw a consistent pattern happening and this pattern was maintained throughout the investigation, until the end. 1-57, 58.

In addition to police observations of the day to day drug deliveries made by defendant Bryant in his Range Rover, there was also electronic surveillance of Bryant traveling in his Range Rover to and from New York on a consistent basis. Trips to New York were confirmed approximately once per week on the following dates: March 17, April 13, April 22, April 30, with even shorter trips to NY on May 8, May 15, May 19 . 1-70. By the end of May, Barnstable police had used CS1 for its fourth controlled buy during the investigation and were ready to seek out a warrant for the Grant Rd. stash house, so they allowed the GPS Warrant to expire. 1-74.Unfortunately, the plan changed once Yarmouth PD informed Barnstable PD that there was an assault of owner Lindholm by defendant Bryant at the Grant Rd. address. 1-76. Barnstable Police had reason to believe after this assault that any drugs stashed at Grant Rd. by Bryant would be removed to another location based on the breakdown of the relationship between the two. 1-76. An Arrest Warrant for defendant Bryant for felony A&B charges issued the morning of June 9th. *See Exhibit #22.* Barnstable Police intended to serve Bryant with that warrant upon his return to Cape Cod. 1-81,82.

Expiration of GPS Warrant Did Not Mean There Wasn't PC

Although the GPS warrant for the Range Rover had expired several days before June 9, Barnstable police had probable cause to believe that when Bryant traveled off-Cape in his Range Rover, (as detected by the Sagamore Bridge plate Reader on June 9) 1-81, that Bryant was once again headed to New York to re-supply with cocaine and oxycodone and that these drugs would be located within the Range Rover once returning to the Cape. This is supported by information given to police by CS2 toward the end of the investigation in May, in which CS2 explained to police that during that

month of May, Bryant was having issues with his family in New York and although the trips to New York had previously been two or three days, now Bryant was just going solely for the purpose of getting narcotics and coming straight back. So, the tirps that happened in May were short-term. Some of them lasted less than 24 hours. 1-82. That the trips became short-term was corroborated by the GPS electronic surveillance.1-82. Further evidence that Bryant had traveled to New York was that Bryant did not return to his 122 Cedar Street home the evening of June 9th, and so was most likely out-of-town, return home on June 10th, which was consistent with his now shorter trips to New York to resupply.

Police Did Not Need to Obtain a Search Warrant for the Range Rover

Since police had probable cause to search the Range Rover for cocaine and oxycodone at the time of the stop on June 10, 2017, the police did not need to obtain a warrant for the search of the Range Rover prior to their search. The Court held in *Commonwealth v. White*, 374 Mass. 132 (1977) that, **for constitutional purposes, there is no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. This rule also allows such searches based on probable cause to be conducted at the station house as opposed to requiring that they be made at the scene where the police initially encounter the motor vehicle. (emphasis added).**

ARGUMENT 3

Search Incident to Arrest: Since the officers had probable cause to arrest defendant Bryant for narcotics distribution, they could search defendant and his Range Rover for evidence of narcotics distribution.

There are two rationales for the search incident to arrest exception: 1) the need to protect officer safety by insuring that a person being taken into custody is not in possession of any weapon; and 2) the need to preserve evidence for later use at trial. *United States v. Robinson*, 414 U.S. 218, 234 (1973). Under federal law, a full search of the person, his effects and the area within his immediate control may be conducted incident to a lawful custodial arrest, without regard of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested *Robinson, Gustafson v. Florida*, 414 U.S. 260 (1973). The right to conduct a search incident to arrest in Massachusetts is more circumscribed than the right under federal law. Under Art. 14, police must have probable cause to believe that a search will yield evidence of the crime for which the arrest was made. Exigent circumstances entailing the risk that the arrestee is concealing a weapon or will destroy evidence will, however, support a

search incident to arrest broader in scope and intensity than that ordinarily permitted by art. 14. *Commonwealth v. Madera*, 402 Mass. 156, 160,161 (1988). *See also M.G.L. c. 276, section 1.*

The facts in our case are vastly different than *Commonwealth v. White*, 466 Mass. 96 (2014), one of two cases defendant cites in his memorandum in support of his argument on the issue of "search incident to arrest". In *White*, the defendant was arrested on outstanding arrest warrants for violation of a protective order under Chapter 209A and for a drug offense. Therefore, the crimes for which the defendant was arrested were allegedly committed at an unknown time in the past, not at or shortly before the time of arrest. In that case, the officer reasonably could not have conducted a search incident to arrest for the purpose of seizing contraband or evidence related to the prior crimes of arrest, because there was no reason to believe that any such contraband or evidence would have any connection to those prior crimes. Consequently, the lawful scope of his search incident to arrest was limited to a search for weapons that the defendant might use to resist arrest or escape or objects that might be used as a weapon. Id. at 1009.

In *Commonwealth v. Toole*, 389 Mass. 159 (1983) police arrested defendant on a warrant for assault and battery; a search of his truck incident to arrest was held to violate M.G.L. c 276 Section 1 given the implausibility that the truck might contain evidence of a battery or that the handcuffed defendant might be able to retrieve a weapon from the cab. In *Toole*, the Commonwealth proceeded before the motion judge on the single theory of search incident to arrest (for A&B) and failed to argue any alternative theory to search incident to arrest. Among alternative justifications which could have been argued but were not was probable cause to search the vehicle; *Commonwealth v. Sweezey*, 50 Mass.App.Ct. 48 (2000), *Commonwealth v. Sanchez*, 403 Mass. 640 (1988) community caretaking; *Cady v. Dombrowski*, 403 U.S. 433 (1973); plain view; *Commonwealth v. Dessources*, 74 Mass.App.Ct. 232, 236-237 (2009); and inevitable discovery; *Commonwealth v. Benoit*, 382 Mass. 210 (1981).

In our case before this Court, the police not only had an arrest warrant in hand for defendant Bryant for felony assault and battery related charges, they also had probable cause (even prior to finding the pills in defendant's pocket) to arrest the defendant for narcotics distribution. On point to our Bryant case before this Court is *Commonwealth v. Sweezy, supra*. In *Sweezy*, officers from the Boston police drug control unit were conducting surveillance in a parking lot and, believing they observed a hand to hand drug transaction, followed the defendant in his car. When the defendant stopped in a line of cars, the officers stopped their vehicle behind the defendant's and approached his car on foot. When the officers announced themselves, the defendant

tried to get away by pulling out of line of traffic and in doing so hit one of the officers with his car. The police were able to block the defendant so he didn't get away. One of the officers removed the defendant from his car and told him he was under arrest for assault and battery on officers. While the arresting officer was informing the defendant of his rights, another officer went to the passenger's side, opened the car door and made a quick search and retrieved a paper bag, which contained narcotics. The defendant argued that the search for drugs was incident to the arrest for assault and bather and that G.L. c. 276 Section 1, which governs a search incident to an arrest, did not support the seizure of the drugs as incident to his arrest for assault and battery because the cocaine was not an instrumentality of that crime and the entry into his vehicle could not be justified as a search for weapons. *See Commonwealth v. Madera*, 402 Mass. 156, 159 (1988).

The Court in *Sweezy* held that probable cause to arrest and search the defendant for illegal drug possession existed independently of the probable cause to arrest him for assault and battery. The existence of probable cause to arrest the defendant for possession of drugs entitled the officers to conduct a search for drugs notwithstanding that the stated ground for arrest was assault and battery. *See Commonwealth v. Lawton*, 348 Mass. 129, 133 (1954) ("if the facts known to the officer reasonable permitted a conclusion that probable cause existed for a drug charge, the arrest should be treated as legal even though he at first assigned another ground" *See also Commonwealth v. Peters*, 48 Mass.App.Ct. 15, (1999). *See also Sanchez supra at 646,647 n.4 (*although the defendant was arrested for assault and battery, police testimony would have supported findings to the effect that there was probable cause to arrest for possession of illegal drugs*)*. And so that is the situation in the case at hand: Barnstable police had probable cause to arrest defendant Bryant on the arrest warrant for a felony A&B, but they also had probable cause to arrest Bryant for narcotics distribution, as well as probable cause to search Bryant and the Range Rover for cocaine and oxycodone.

ARGUMENT 4

Search Incident to Arrest: Barnstable Police could have searched the area within the defendant's immediate possession and control inside of the Range Rover at the time defendant was pulled out of the vehicle by the police.

The defendant argues that police could not search the interior of the Range Rover in which defendant Bryant had access prior to being pulled out because defendant was immediately arrested, pat frisked and determined not to be armed and so the officers were not at risk of the defendant gaining access to any weapons in the vehicle at that time. The defendant does not cite any case law concerning "search

incident to arrest". Warrantless searches are presumptively unreasonable unless the commonwealth can show that the search falls within "an exception to the warrant requirement". Search incident to arrest is one such exception. The Exception requires that 1) the arrest must be lawful 2) Search must be made substantially contemporaneously with the arrest; and 3) the purpose of the search is limited to fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made (and removing weapons) *Chapter 276 Section*. In addition, the scope of the search incident to arrest is limited to the area "within the defendant's immediate possession and control at the time".

Based on Detective Butler's testimony, the area in which the package of cocaine was found was well within defendant Bryant's reach at the time he was driving his Range Rover and pulled it up into the driveway. Det. Butler described the Range Rover as a traditional SUV and that the cocaine was sticking out from behind the front passenger seat. Defendant Bryant, if he were driving the car, would have been able to access the area fairly easily. 1-102 There was no barrier between the front seat and the backseat and it was in close proximity to the driver, relatively 1-103. *See Exhibit #17.* In support of the argument that defendant Bryant had access to the underside of the passenger seat is the presence of white powder in the same sub-shape as the packaged cocaine. The Defendant argues that the white powder observed in *Exhibit #11* and *Exhibit #12* "was consistent with the powder found elsewhere in the vehicle and similar in color to the obvious foot markings on the seat just above the "powder', on the door frame, on the rear passenger side door etc.(defendant is presumably referring to chunky powder seen in *Exhibits15, #16, #20.*

The Commonwealth strongly disagrees with the defendant's characterization of the powder. The photos showing the powder on the seat back and on the black floor mat are NOT the same white substance seen throughout the rest of the Range Rover. The powder marking on the back of the seat is the SAME shape as the sub-shaped cocaine package. The Commonwealth suggests that the defendant, while driving and being followed by the police, attempted to hide the cocaine under the passenger seat and so reached around from the driver's side, trying to shove the package under the seat. It appears that the defendant was initially unsuccessful and missed his mark, banging the package of cocaine against the seat back instead, creating a powder mark in the shape of the package on the seat back. Eventually, defendant was able to shove ½ of the package under the seat, with the rest sticking out. The Commonwealth further suggests that the "powder", which appears to be more "chunky" and on the gas and brake pedal, referenced by the defendant in his memorandum, is merely the remnants of crushed shells from the defendant's driveway (*See Exhibits #6,#7,#8)* that were tracked into the Range Rover by police at the scene and by Det. Ginnetty, who admitted

he did not wipe his feet prior to getting into the Range Rover before driving it back to the Barnstable Police Station. 3-81, 82.

Just Because Bryant is Handcuffed Doesn't Mean Police Can't Search

Even if the defendant is removed from the scene, this should not preclude them from seizing those items. *Commonwealth v. Netto*, 438 Mass. 686 (2003). The Court in *Netto* held that the validity of a search does not end at the instant risks justifying the search come to an end. The *Netto* court recognized the pragmatic necessity in not invalidating a search incident to arrest the moment that the attendant risks are deemed no longer to exist. The bright line rule in Madera was inspired, in part, by the view that officers need not reorder the sequence of their conduct during arrest to satisfy an artificial rule that would liken the validity of the search to the duration of the risks. The Court concluded that the fact that police handcuffed defendants and removed them from the room prior to seizing items they could have seized immediately upon entry should not preclude them from seizing those same items immediately following the removal of the defendants. *Commonwealth v. Madera*, 402 Mass. 256 (1988) and Netto, Supra.

Another case supporting the Commonwealth's position that the Barnstable Police were legally justified to search the area under the immediate control of Bryant in his Range Rover is *Commonwealth v. Figueroa*, 468 Mass. 204 (2014) a case which cites *Netto, Supra*. In *Figueroa*, the court noted that "we do not measure its scope by the "grab area" at the time of the search, when the defendant may have been restrained or handcuffed. Measuring the "grab area" at the time of the search would compromise the safety of arresting officers because it would require them to seize all evidence within the arrestee's immediate control before securing the arrestee in order to make lawful the search incident to arrest. *Figueroa at 215*.

ARGUMENT 5

Detective Mark Butler was lawfully inside the Range Rover in conducting his community caretaking responsibilities pursuant to Chapter 140 Section 174F,

Testimony from police witnesses and Cindy Sherman, the Animal Control Officer for the Town of Barnstable was that on the afternoon of June 10, 2017 it was a clear, hot, sunny 80 degree day. Once police arrested Bryan, they were obligated by statute to take the dog into their custody to prevent the dog's exposure to extreme heat within the Range Rover. Detective Butler and the Animal Control Officer testified that as law enforcement officers, pursuant to Chapter 140 section 174F, they could NOT have left that dog in the vehicle on that day based on the weather conditions and the fact that there was no one available at the scene who could take custody of the dog. 2-165, 3-149 and that leaving the dog in the car could reasonably be expected to threaten the

health of the dog due to exposure to extreme heat. 3-149. It should also be noted that police asked defendant Bryant what to do with the dog and defendant refused to tell police. The dog was impounded at the Animal Inn in Forestdale and according to the Impound Receipt (*Exhibit 21*), and the testimony of the Animal Control Officer, the dog was not retrieved until ***one full week later***, on June 17, 2017. 3-143.Whether the dog was retrieved at the scene of the arrest, or back at the Barnstable Police Station, the police would have legally found themselves inside the Range Rover to retrieve the dog and the package of cocaine would have been discovered. *See Commonwealth's argument concerning Inevitable Discovery at the end of its memorandum.*

ARGUMENT 6

Detective Butler, once legally inside the Range Rover, inadvertently discovered and immediately recognized the cocaine package on the floor.

For a seizure to be valid, there are three mutually dependent prerequisites: 1) a prior valid intrusion by officers into a constitutionally protected area; 2) an "inadvertent" discovery of the item to be seized; and 3) "immediate" recognition of the item's evidentiary significance (that is probable cause for its seizure). *Commonwealth v. Forde*, 367 Mass. 798, 808-809 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In the plain view situation, the view takes place after a valid intrusion into areas as to which there is a reasonable expectation of privacy. Under the plain view doctrine, if police are lawfully in a position from which they view an object, if the officers have a lawful right of access to the object, if discovery of the object is inadvertent, and if its incriminating character is immediately apparent, they may seize the object without a warrant. *Coolidge id.; Commonwealth v.* Santana, 420 Mass. 205, 211 (1995).

Although the plain view doctrine requires that the items seized have an "immediately apparent" evidentiary significance, this language found in *Coolidge Supra.* can be misleading. The plain view seizure doctrine requires that the items must have an apparent nexus or connection to criminal activity. That is, the police must either recognize the items as contraband or have probable cause to believe the items are related to criminal activity. So, the use of "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine. *Texas v. Brown*, 460 U.S.730, 741 (1993)(plurality opinion). The doctrine requires only that an officer have probable cause *before* seizing an incriminating item. *Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993).

Detective Michael Wells described that the defendant, who was uncooperative, was removed from the Range Rover through the passenger's side by himself and

Detective Ginnetty. Defendant Bryant was placed into handcuffs and Detective Ginnetty and Detective Wells conducted a search of him. 3-202. Detective Ginnetty located a bulge and removed a plastic baggie with a number of pills in it. 3-204. Defendant Bryant was then walked over to Officer Joe Green's marked cruiser. While Detective Wells was standing next to the Range Rover, he observed a dog in the backseat, through the open front passenger door. 3-204. Detective Wells then notified the Barnstable "guys" that there was a dog in the backseat. 3-205. Detective Butler came over and opened the door. 3-205. Detective Butler testified that when he opened the door, he observed an object approximately a foot long wrapped in cellophane. There was a black floor mat and on the floor mat, and on the back of the tan-colored seat, there was a white powdery substance. 1-97 *See Photo Exhibit* s *11,12,14,15* . Based on Det. Butler's testimony and exhibits showing photos of where the cocaine was located on the floormat, it was in plain view when Det. Butler opened up the back passenger door to the Range Rover: "It's obvious.It's clear...There wasn't a whole lot of –the car was relatively clean. So there wasn't a whole lot else in there. But [the cocaine] stood out, particularly." 1-97.

An Officer's Training and Experience Should Be Weighed Deferentially.

It is extremely important for the Court to recognize two things:

1) Detective Butler's extensive training and experience in the area of narcotic's investigation: He's been a detective since 2012 and a Sergeant since 2016. In addition to the Police Academy, he attended two trainings specific to narcotics. One was hosted by the Municipal Police Institute, called Street-Level Narcotics and the other was hosted by the DEA, which was a two week long narcotics school. He is also a Task force Officer with the DEA which offers additional narcotics training. He estimated that he has been involved in over 100 cases involving narcotics offenses over the last 10 years. He has been a DEA Task Force Officer for 7 years. 1-10,11;

2) The mountain of information the police already had obtained through their two confidential sources, as well as the GPS and physical and video surveillance concerning defendant Bryant's narcotics dealing activities. **An officer's training and experience should be weighed deferentially**. *Texas. v. Brown*, supra, at 746 (Powell, J. *concurring)(experienced officer recognized that an innocent-looking party balloon was knotted in a fashion commonly used to package heroin).* Detective Butler testified that when he saw the package on the floorboard, he said out loud to other officers "that's going to be our cocaine" 2-21 and pretty shortly thereafter, he "immediately identified it as cocaine" 2-130. Detective Butler also testified that "my first indication was that's probably cocaine". 1-97. On cross-examination, Det. Butler responded to defense counsel "to me, it was cocaine. Defense counsel questioned "you made the assumption

it was cocaine, right?" Det. Butler responded "it wasn't an assumption. I turned to the officer and said, that's going to be our cocaine." 3-22.

Detective Butler continued to explain why he believed the package contained cocaine in that the investigation from the start corroborated the detailed information from CS1 and CS2 that Bryant traveled to NY on a regular basis, and that he picked up half of a kilo to a kilo of cocaine. "And just that, alone, was consistent with what I was looking at, based upon my training and experience. That is consistent with how cocaine is packaged, especially in bulk" 1-97,98. Not only was the packaging of the cocaine on the floorboard of the Range Rove consistent with how cocaine is traditionally packaged in bulk, but it was also significant to Det. Butler in this case because the Saran Wrap packaging was consistent with what CS2 told Detective Butler about how **THIS defendant packages bulk cocaine. (Emphasis added)** Det. Butler testified that during the week of February 26th, CS2 gave Bryant a ride from the bus station in Bourne to Grant Rd. and during that trip, Bryant had a kilo of cocaine in his possession. She drove Bryant to 24 Grant Rd.and they went into the basement. CS2 assisted Bryant in unraveling a kilo of cocaine from his body. **The Kilo of cocaine was attached to his body using Saran Wrap (emphasis added)** 3-7. The fact that the package partially under the seat was also wrapped in Saran wrap was obviously significant to Det. Butler 3-17 in assisting him in recognizing the package as bulk cocaine.

In *Commonwealth vs. White*, 469 Mass. 96, 102 (2014), white tablets found inside a vehicle in an unlabeled container should have been suppressed where the pills were not readily identifiable as a controlled substance. The Court found that the officer lawfully entered the vehicle to retrieve the keys from the ignition in order to secure the vehicle, and the unlabeled container was found in plain view on the front passenger seat. *Id. At 1012*. However, under the plain view doctrine, the court held that the officers couldn't possibly have known whether the pills were plausibly related to criminal activity of which the police were already aware" Id. At 2013. The Court continued to explain that the officer could not have known that the pills were related to the defendant's known criminal activity where the defendant had been arrested on outstanding arrest warrants, as opposed to a situation in which the police officer had first-hand knowledge of the investigation resulting in the drug arrest warrant of the defendant.

Common Sense Would Dictate that the Cocaine Shoved Under the Seat Was Not a Sandwich.

In addition, the Commonwealth urges the Court to use its common sense. Defendant argues that Butler did not have probable cause to believe that the package contained cocaine because he described it in the shape of a "sub" and so somehow Det

Butler could have believed that this package was merely a sub sandwich. That is ridiculous, as we can see from the photo exhibits and from testimony that the "package" was surrounded by white powder and clearly there was an effort to hide it under the seat. Det. Butler could expect that defendant Bryant would attempt to hide illegal contraband. He would not have reasonably expected that the defendant would attempt to hide a sub sandwich under the seat. Contraband, instrumentalities and "fruits" of a crime are in most cases easily recognized as such. *See Commonwealth v. Irwin*, 391 Mass. 765, 770-771 (1984).

ARGUMENT 7

While Detective Ginnetty was searching defendant Bryant upon arrest, he felt a bulge in defendant's shirt pocket that was immediately recognizable to him as a large knotted bag of pills.

The plain "feel" doctrine often arises in connection with a frisk but also has application under plain view seizures. In *Minnesota v. Dickerson*, 508 U.S. 366, 375-76(1993), of officer, lawfully patting down a suspect's outer clothing, felt an object whose contour and mass made its identity immediately apparent. There was no invasion of privacy beyond that already authorized by the search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context. *See Commonwealth v. Wilson*, 441 Mass. 390, 397 (2004). For the "plain feel" exception to apply, the nature of the object must be "immediately apparent" to the frisking officer. *Minnesota v. Dickerson Supra.* "Immediately apparent" does not mean "for certain"; it simply means that the officer must have probable cause to believe that the object is incriminating *before* seizing it. *Texas v.Brown*, 460 U.S. 730, 741 (1983)

Defendant Bryant was brought back to Officer Green's cruiser. Det. Ginnetty testified that he searched him and felt a large bulge bumpy bulge in defendant's left front shirt pocket. In fact, that large bulge turned out to be 260 oxycodone pills and 60 Xanax 3-85. Det. Ginnetty described it as bigger than a golf ball but smaller than a baseball. 3-73. He further testified that he could feel a ball and a second ball attached to it and that, based on his training and experience, it was a knotted bag. 3-74. Also, based on the feel of the lumpy bulge and knotted baggie, and based on Detective Ginnetty's training and experience, he believed it to be a pill type narcotic. He testified that the policy within the Barnstable Police department was to search someone prior to putting them into a cruiser and that he searched Bryant for two reasons: 1) to make sure he did not have any weapons and 2) that there was no evidence on the defendant that could be destroyed inside the cruiser. 3-76. After concluding that the knotted bumpy

bulge in defendant's pocket was a pill type narcotic, Det. Ginnetty unzipped defendant's pocket and said to the other officers on scene "we have to remove those" 3-78, which he did. However, Det. Ginnetty then put defendant inside the cruiser and put the baggie of pills back into defendant's pocket in order to take photos 3-78 before removing them again. The pills would have been evidence that could have been destroyed by the defendant while inside the Cruiser had Det. Ginnetty not removed them from defendant's pocket.

The defendant in our case argues that Det. Ginnetty described his initial impression of the bulge as something other than being immediately apparent to be contraband. The Commonwealth strongly disagrees with this characterization. This Court must take into consideration Detective Ginnetty's training and experience, as well as his own knowledge of the entire narcotics investigation of defendant's oxycodone pill enterprise leading up the defendant's arrest. In *Commonwealth v.* Bly, Massachusetts Appeals Court, No. 16-P-1724 slip op. at 92 Mass. App. Ct. 1130 (March 2, 2018), a Boston police officer on patrol received a radio call for "shots fired" nearby, and proceeded to the scene. When he arrived, he observed a disabled car with apparent bullet damage to the windshield and observed three individuals standing nearby. The officer approached the group and asked the driver to identify himself. The defendant stepped forward and the Officer informed the defendant he was going to pat frisk him. As the defendant raised both hands, the officer observed in plain view a clear plastic baggie in his hand. Inside the baggie appeared to be a number of small pills and it was knotted on top. Based on the officer's training and experience, he believed that the baggie contained illegal drugs packaged for street-level sale. He took the baggie out of the defendant's hand; the defendant stated that the pills were Percocets. The officer arrested the defendant.

In *Bly,Supra.,* the defendant took issue with the third prong of the [plain view] test, arguing that the incriminating nature of pills the defendant was holding was not apparent until after the officer seized the baggie and the defendant informed the officer that the pills were Percocets. The Court disagreed. Officer Lopez testified that when the defendant raised his hands, he observed in the defendant's right hand a small clear baggie, knotted on top, containing a number of small pills. From his training and experience, Officer Lopez believed that the pills were drugs, packaged for street-level sale. While a plastic baggie may be "capable of use for a lawful as well as an unlawful purpose", *Commonwealth v. Rivera,* Mass.App.Ct. 41, 43 n.3 (1989) if there is "some characteristic of the particular baggie observed in plain view that indicates that it is being used for an unlawful purpose, that fact alone may be enough to justify seizure." *Commonwealth* v. *Garcia,* 34 Mass. App. Ct. 645(1993). Thus, Officer Lopez's seizure of the baggie was proper. See *ibid.*, quoting from *Texas* v. *Brown*, 460 U.S. 730,

742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) ("Probable cause merely requires that the facts available to the officer would warrant a [person] of reasonable caution in the belief . . . that certain items may be contraband").

Here are some, (but certainly not all) facts brought out in testimony that assisted Det. Ginnetty in recognizing immediately that the pills he felt in defendant Bryant's pocket were illegal contraband:

1. The initial information given to police concerning the defendant by CS2 was that defendant Bryant traveled from the Cape to Brooklyn once a week for the purpose of picking up cocaine and oxycodone and traveled back to cape Cod with both narcotics. The defendant had several customers on Cape Cod to distribute cocaine and oxycodone to. 1-20 CS2 told police that Bryant brought back hundreds and hundreds of pills from New York and that she had purchased oxycodone from him on many occasions over the past five or six months of 30 or 50 pills. 1-20, 21. CS2 aware Bryant take own vehicles to and from NY and would occasionally take a rental vehicle or a bus and was aware that on a couple of occasions, Bryant came back to Cape with narcotics on his person.
2. CS2 was fronted 41 oxycodone pills from Bryant on March 23, 2017 during a controlled buy. In fact, Det. Ginnetty was directly involved in this transaction and was the officer responsible for searching CS2 right after she handed over the 41 pills to police after the defendant had fronted the pills to her. 3-32.
3. In early April (either April 4 or April 6, 2017), Detective Butler overheard a speaker phone conversation between CS2 and Bryant concerning how much money CS2 owed Bryant over proceeds from oxycodone fronted to CS2 by Bryant. Detective Butler testified that this argument was consistent with CS2 statements about Bryant fronting her pills for her to sell for him and give him proceeds and also investigation by police in which they conducted controlled buys in which CS2 was fronted pills by Bryant and she returned with the proceeds from her sale of those pills.1-48, 49.
4. Detective Ginnetty had a wealth of knowledge or "facts" available to him that would warrant him in the belief that the large bulge of pills in defendant Bryant's pocket were oxycodone. This knowledge was based on the extensive Barnstable Police investigation over the previous three months prior to defendant's arrest. Not only was there extensive information provided by CS1 and CS2 concerning defendant's sale of oxycodone to numerous customers in the Mid-Cape area, but also several controlled buys from the defendant involving oxycodone and even a recorded conversation between CS2 and the defendant concerning money owed to the defendant by CS2 from her sales to defendant's customers of oxycodone fronted to CS2 by the defendant.

ARGUMENT 8

The Defendant Did Not Have a Reasonable Expectation of Privacy In His Driveway When He Failed to Stop for Police and Because a Driveway is treated as Semi-Private for purposes of the Fourth Amendment.

The Defendant argues that the seizure of defendant's vehicle was illegal because at the time defendant was stopped and placed under arrest, the vehicle which defendant was driving was located on private property. A driveway is treated differently under the law than a residence. A driveway is only a semi-private area. *Commonwealth v. A Juvenile, 411 Mass. 157, 161 (1993)* The inherent mobility of an automobile can supply the exigency required to justify a warrantless search and seizure on probable case. Generally, less stringent warrant requirements have been applied to automobiles. This is because an automobile is readily movable. *Id. at 163.* To argue that police could have posted a guard while officers left to apply for a warrant is unsupported by case law. For constitutional purposes, there is no difference between on the one hand seizing and holding an automobile before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. Id. at 162; *Commonwealth v. White Supra.*; *See United States v. Evans*, 481 F.2d 990, 994 (9th Cir. 1973) (as to automobiles, "standing guard...represents the same inference with property rights" as a seizure).

The Fourth Amendment and Mass. Const. Declaration of Rights Art. 14, protect from unreasonable search and seizure those areas in which individuals have a subjective expectation of privacy that is objectively "reasonable," "justified," or "legitimate.

1. whether the individual
2. had a subjective expectation of privacy in place searched or item seized;
3. is society prepared to recognize expectation as reasonable – whether the individual's expectation, viewed objectively, is justifiable under the circumstances;

The Burden of proof is on a defendant who challenges police action to establish that it infringed upon his reasonable expectation of privacy. *Commonwealth v. A Juvenile, Supra.*. Defendant Bryant cannot argue that he had a reasonable expectation of privacy, (in which society deems reasonable) in his driveway, which is clearly visible from the street, when he knew he had numerous police cars following behind him, attempting to pull him over on the streets leading up to his driveway and where

defendant Bryant pulled into the driveway and maneuvered his Range Rover in such a way as to sideswipe Detective Ginnetty's vehicle. *See Photo Exhibits #7,#8.*

ARGUMENT 9

The Range Rover was legally seized for Forfeiture by Barnstable Police pursuant to Chapter 94C Section 4, based on their extensive investigation that the Range Rover was being used by defendant Bryant to transport illegal narcotics for sale.

Detective Butler testified that the Range Rover was taken back to the station pending forfeiture proceedings and that even if the police had not found the pills on defendant Bryant, or the cocaine in the vehicle, the Barnstable Police would have seized the vehicle as a culmination of the extensive investigation involving the Range Rover and narcotics distribution. 1-108 This Court took Judicial Notice of the Barnstable Superior Court Docket related to the forfeiture proceedings for the 2009 Range Rover. 2-139. Pursuant to G.L. Ch. 94C, Section 47(a)(3), automobiles used in illegal transportation of controlled substances are subject to forfeiture. *Commonwealth v. One 1977 Pontiac Grand Prix* Auto, 375 Mass. 669 (1978). Defendant Bryant's 2009 Range Rover was subject to forfeiture based on probable cause to believe that the vehicle was used in the illegal transportation and delivery of both cocaine and oxycodone. Although the requirement of a warrant applies in cases in which the object of the seizure is forfeiture, G.L. Ch. 94C, Section 47(f)(1) permits the Barnstable Police to seize for forfeiture the Range Rover due to exigency. **Exigent** circumstances, however, may excuse the failure to obtain a warrant."); *United States v. Pappas*, 613 F.2d 324, 329-30 (1st Cir. 1980); Massachusetts law is unmistakably clear that judicial process is required to seize property for purposes of [*30] a forfeiture action unless a recognized exception to the warrant requirement (such as exigency) exists. G.L.Chapter 94C, §§47(f)(1). Commonwealth v. Negron, 2005 Mass. Super. LEXIS 371, *28-30, 19 Mass. L. Rep. 596.

ARGUMENT 10

Both the Baggie of Pills and the ½ Kilo of Cocaine Would Have Been Obtained Inevitably Pursuant to a Booking Inventory Search of Defendant Bryant and a Motor Vehicle Inventory Search of the Range Rover.

As the Commonwealth's last catch-all argument, the drug evidence should be admitted under the doctrine of inevitable discovery. The Range Rover was seized and taken to the police station, where an Inventory of the vehicle was conducted by Detectives Butler and Ginnetty. 1-113,114. Pursuant to their inventory search, no items of evidentiary value were seized by the police. 1-114. However, had there been a package of cocaine inside the vehicle, it would certainly have been discovered during

this search. Similarly, the pills seized from the defendant's shirt pocket would certainly have been located during a booking search of the defendant at the police station. The defendant was arrested on a Felony Arrest Warrant *See Exhibit* #22. The police would have thoroughly searched and inventoried the defendant's belongings prior to placing him in a cell pending his Court Ordered appearance in the Barnstable District Court (*see* page 2 of the Arrest Warrant).

The Commonwealth has the burden of proving the facts bearing on inevitability by a preponderance of the evidence. Rather than adopt the imprecisely defined "clear and convincing" standard of proof, we prefer to require a high level of specificity and detail in a judge's findings and analysis of the facts. *See Custody of a Minor (No. 1)*, 377 Mass. 876, 884-886 (1979) It would not be enough to say that the "inevitability" of discovery is established by proof that, more probably than not, the evidence would ultimately have been found by lawful means. Such a standard dilutes the meaning of the word "inevitable". Once the relevant facts are found by a preponderance of the evidence, the question is whether on those facts discovery by lawful means was certain as a practical matter. Discovery of both the 320 pills in defendant's pocket and the ½ kilo of cocaine on the floor mat of the Range Rover was certain as a practical matter.

CONCLUSION

Wherefore, the Commonwealth respectfully requests that this Court deny the defendant's Motion to Suppress.

Respectfully Submitted,
COMMONWEALTH OF MASSACHUSETTS

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Dated: May 8, 2019